UNITED STATES DISTRICT COURT
EASTERN DISTRICT NEW YORK

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ANTHONY PAGANAS, : 15-CV-5424 (JBW)(LB)

Plaintiff, :

v. :

TOTAL MAINTENANCE SOLUTION, LLC, ARON WEBER, and REGGIE TARTAGLIONE, :

Defendants and Third Party Plaintiffs, :

v. :

ST. JOHN'S UNIVERSITY, NEW YORK :

Third-Party Defendant.

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MEMORANDUM OF LAW IN FURTHER SUPPORT OF ST. JOHN'S UNIVERSITY, NEW YORK'S MOTION FOR SUMMARY JUDGMENT AS TO THE CLAIMS OF THIRD-PARTY PLAINTIFFS PURSUANT TO FED. R. CIV. P. 56

ARGUMENT

SJU's moving brief establishes that it is entitled to summary judgment on TMS' third party complaint for indemnification based on the plain language of the Services Agreement. Specifically, the Services Agreement provides that it is SJU which is entitled to indemnification from TMS for employment claims asserted by TMS' employees, and thus TMS' third-party complaint seeking indemnification from SJU—turning the parties' contract on its head—must be dismissed.

In opposition, TMS fails to offer any evidence disputing the following irrefutable facts which form the basis for SJU's motion:

- TMS is contractually required to indemnify SJU for "employment" claims filed by TMS employees;
- Paganas' instant action, alleging that TMS misclassified him as exempt from the overtime provisions of wage and hour laws, constitutes an "employment" claim; and
- As Plaintiff's sole employer, TMS was solely responsible for (mis)classifying Plaintiff as either exempt or non-exempt from overtime pay requirements and paying him in accordance with applicable laws.

Faced with this indisputable record compelling summary judgment, TMS tosses two hail-Marys—neither of which hits the mark.

First, TMS argues that the Court's earlier denial of SJU's pre-discovery motion to dismiss the complaint constitutes the "law of the case"—despite acknowledging that the standard for evaluating a motion for summary judgment is very different, and all the while ignoring the evidence (or lack thereof) adduced during discovery. Decisional law is clear that this doctrine has no application here whatsoever.

Next, in an even more desperate bid to save its unsupportable claim, TMS attempts to misdirect the Court through a sleight of hand argument, contending that any damages Paganas recovers for TMS' illegal wage and hour practices should be considered part of the "Basic Fee" that TMS charged SJU under the Services Agreement. The contention is patently illogical on its face and, if adopted, would read out of the Services Agreement SJU's broad and unqualified indemnification for precisely the kind of misconduct Paganas alleges TMS engaged in.

More critically for purposes of summary judgment, TMS offers no evidentiary support for its fallacious reading of the Services Agreement. Indeed, TMS' "damages-as-'Basic Fee'" argument hinges on its claim that SJU had a "past practice" of reimbursing TMS for employment claim settlements (or judgments). Yet, TMS fails to put forth any admissible evidence of such a practice and, in fact, TMS' own deposition testimony *concedes that no such practice existed.* In any event, whether such a practice existed is of no moment, because the Agreement explicitly provides that "[n]o course of dealing . . . shall operate as a waiver of any of the rights of [SJU] hereunder." (*See* Cooper Decl., Ex. 3, at § 4.6(i).).

For these reasons, SJU respectfully requests that the Court grant its motion for summary judgment and dismiss TMS' third-party claim with prejudice.

I. THE DOCTRINE OF THE "LAW OF THE CASE" HAS NO APPLICATION HERE

In a groundless effort to sustain its moribund claim against SJU, TMS puts forth an unavailing contention that the "law of the case" doctrine precludes SJU from moving for summary judgment. TMS claims that the "proof offered [by SJU] in support of the instant motion is materially no different than that offered in support of" SJU's pre-discovery motion to dismiss, and that the Court has "already held that [TMS has] pleaded a viable cause of action.

Therefore, there are legal issues to be decided, thus mandating denial of the motion." (*See* Pl. Opp. Brief at 9.)

Of course, it is black letter law that the "law of the case" doctrine does "not preclude a district court from granting summary judgment based on evidence after denying a motion to dismiss based only on the plaintiff's allegations." *Maraschiello v. City of Buffalo Police Dep't*, 709 F.3d 87, 97 (2d Cir. 2013), *cert. denied*, 134 S.Ct. 119 (2013). Indeed, as TMS concedes in its opposition brief, the Court must consider motions to dismiss under Fed. R. Civ. P. 12(b)(6) under a very different standard than that which controls motions under Fed. R. Civ. P. 56, and thus courts routinely grant summary judgment motions despite having previously denied pre-answer motions to dismiss. *Jean-Laurent* v. *Lawrence*, 2015 WL 1208318 at *5, 12-CV-1502 (S.D.N.Y. March 17, 2015) (granting summary judgment and holding "law of the case" doctrine inapplicable to defendant's motion for summary judgment because court's initial decision denying motion to dismiss was made at a stage of the litigation "when it was bound to accept Plaintiff's allegations … as true," whereas "at summary judgment, Plaintiff—as the party who bears the burden of proof at trial—must show evidence of his entitlement to relief.").[1]

Here, on February 17, 2016, the Court denied SJU's pre-discovery motion to dismiss TMS' claims, citing the Court's obligation to avoid repetitive litigation. The Court did not substantively rule on the meaning of the Agreement. Now, after months of discovery, SJU

[1] Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate if there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party appears to have met this burden, the opposing party must produce evidence that raises a question of material fact to defeat the motion. *See* Fed.R.Civ.P. 56(e). On the other hand, to survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *V.P. Music Group, Inc. v. McGregor*, 2012 WL 1004859 at *2, 11-CV-2619, Weinstein, J. (E.D.N.Y. March 23, 2012.) (internal quotation marks omitted) A court ruling on a 12(b)(6) motion is to "accept as true the facts alleged in the complaint, and may consider documents incorporated by reference in the complaint and documents upon which the complaint relies heavily." *Id.* (internal quotation marks omitted).

brings the instant motion with the support of numerous damning admissions on the part of TMS through its 30(b)(6) deposition witnesses. Notably, those admissions were obtained during discovery and after the Court's February 17 ruling. For example, in the months since this Court's February 17 ruling, TMS has admitted that: (1) Paganas' lawsuit is an "employment" claim (*See* Cooper Decl., Ex. 2 at 62:5-7.); (2) TMS has no knowledge of any instance in which SJU reimbursed it for any settlement or judgment award that TMS paid to its employees in respect of an employment claim (*See* Cooper Decl., Ex. 2 at 17:5-19:7, 72:7-73:24; Ex. 1 at 80:4-12.); and (3) TMS is not aware of (and certainly has not produced) any documents proving that SJU *ever* reimbursed TMS any settlement or judgment award that TMS paid to its employees. (*See* Cooper Decl., Ex. 1 at 76:12-80:12; Ex. 2 at 72:7-76:19.) Moreover, discovery—combined with TMS' feeble attempt to oppose the instant motion—has also exposed the fact that TMS can present *no evidence whatsoever* supporting its claim for reimbursement.

SJU's motion for summary judgment, armed now with admissible evidence not available prior to discovery, is not barred by the "law of the case" doctrine, and the Court should now evaluate the motion pursuant to the applicable standards under Rule 56.

II. TMS FAILS TO ADDUCE ADMISSIBLE EVIDENCE THAT THE SERVICES AGREEMENT ENTITLES IT TO INDEMNIFICATION FROM SJU

TMS expressly agreed to indemnify SJU against precisely the liability for which it now seeks reimbursement from SJU—namely, for any claims "in connection with [TMS'] performance under the Services Agreement, including any and all claims by [TMS' employees] concerning their … employment." (*See* Cooper Decl., Ex. 3 at § 4.2.) TMS has *conceded* under oath that (i) Paganas' lawsuit is an employment claim (as it seeks to recover employee wages), and (ii) that that SJU has fully paid TMS all installments of the Basic Fee that have been invoiced to SJU under the Services Agreement. (*See* Cooper Decl., Ex. 2 at 59:11-14, 62:5-7.)

Faced with these insurmountable and undisputed facts, TMS peddles an illogical and unsupported theory: that, notwithstanding the Services Agreement's indemnification provision in favor of SJU, TMS is entitled to reimbursement from SJU for any damages awarded to Paganas in respect of his "employment claims"—*claims explicitly covered by the Services Agreement's indemnification provision.* Such an interpretation is at odds not only with the plain meaning of the Services Agreement (indeed, it turns the Services Agreement on its head), but also all of the available evidence adduced by TMS.

Although we debunk TMS' argument in detail below, we remind the Court that it is nothing more than a classic law school red herring. Indeed, the Services Agreement is eminently clear that "No course of dealing . . . shall operate as a waiver of any of the rights of [SJU] hereunder." (*See* Cooper Decl., Ex. 3, at § 4.6(i).) Thus, even if TMS could prove that a past practice exists—which it cannot—SJU's motion for summary judgment still must be granted.

A. No Record Evidence Supports TMS' Contention That SJU Reimbursed TMS for Settlements and Judgments Awarded for Employment Claims Covered by the Indemnification Provision.

TMS' opposition papers contend that notwithstanding the indemnification provision in favor of SJU, any damages awarded to Paganas to compensate him for TMS' violation of wage and hour laws should be considered part of the "Basic Fee" that SJU must pay TMS.[2] TMS' argument rests solely on its claim that SJU had a "past practice" of reimbursing TMS for

[2] TMS also claims that SJU's interpretation of the indemnification provision "would nullify, destroy, and invalidate TMS's right to reimbursement of wage costs which it incurred while providing services to SJU." (*See* Pl. Opp. Brief at 7.) TMS goes so far as to claim that "[TMS]' right to be reimbursed for wages and benefits would be excused from the Agreement and there would be no recourse or remedy open to TMS for such claims." (*Id.* at 8.) This is nothing more than a restatement of its argument that damages awarded to Paganas based on TMS' alleged misclassification of him is somehow part of the "Basic Fee" under the Services Agreement. If Paganas is able to establish liability, then, at best, TMS made an unlawful error in classifying Paganas as an exempt employee. That alleged unlawful error by TMS triggers the indemnification clause in the Services Agreement, requiring TMS to take financial responsibility for everything arising from TMS' mistake—which are damages under the law and attorneys fees, not "costs" under the Services Agreement.

employment claim settlements (or judgments). However, the only admissible evidence on this point—TMS' own deposition testimony—concedes that no such past practice existed.

TMS first provides the Court a cherry-picked portion of Richard Rossi's 30(b)(6) testimony, in which he offers nothing more than inadmissible speculation that SJU may have previously reimbursed TMS for the settlement of an employment claim by former TMS employee Anthony Kalaritis.[3] (*See* Pl. R. 56.1 Statement at ¶¶39-40; Cooper Decl., Ex. 1at 71:8-19.) However, reading the remainder of the transcripts, in context, reveals that *neither of TMS' 30(b)(6) witnesses were able to identify a single occasion in which SJU reimbursed TMS for a settlement or judgment awarded to a TMS employee*. (*See* Cooper Decl., Ex. 1 at 80:4-12; Ex. 2 at 17:5-19:7, 72:7-76:19.) What is worse, TMS barely bothered to conceal its attempts to mislead the Court, as the inadmissible speculation offered by TMS is dispelled—if not wholly contradicted—not only by Dennis Hasher, TMS' other 30(b)(6) witness, *but also by Rossi himself as he was subjected to further questioning*.[4]

Specifically, Rossi first testified that the Kalaritis matter ended in either a settlement or a judgment for $50,000, adding that "and being a cost-plus contract, *I think* St. John's paid TMS for that particular award." (*See* Cooper Decl., Ex. 1, at 71:8-19.) This speculation ("I think") was later corrected, however, when Rossi made clear that he had no basis for such a belief. Indeed, in response to further questioning on the subject, Rossi testified that:

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[3] "It is well-established that the non-movant cannot rest on mere conclusory allegations, speculation or conjecture ... but instead must set forth specific facts in the form of affidavits, depositions, answers to interrogatories, or admissions showing that a genuine issue exists for trial. *Scott v. County of Nassau*, 1999 WL 85528 at *1, No. 94 CV 4291, Gershon, J. (E.D.N.Y. Feb. 9, 1999) (citing *Celotex Corp.*, 477 U.S. at 324); *Abreu v. City of New York*, 2006 WL 401651 at *10, No. 04-CV-1721, Weinstein, J. (E.D.N.Y. Feb. 22, 2006) (where plaintiff presented "no deposition testimony of any person who claim[ed] to have personal knowledge" of the facts necessary support his claim, and offered only one potentially admissible document supporting plaintiff's allegations, court granted defendant's motion for summary judgment on finding that "[n]o rational jury could return a verdict in plaintiff's favor based on the evidence plaintiff proffer[ed].").

[4] In the interest of transparency, SJU attaches the complete transcript of Rossi's 30(b)(6) deposition at Cooper Decl., Ex. 4 and the complete transcript of Hasher's 30(b)(6) deposition at Cooper Decl., Ex. 5.

(1) he was *not* aware of any invoice presented to SJU for payment of the Kalaritis settlement/award (and TMS has produced no documents in this litigation supporting the allegation that SJU has reimbursed TMS (or even supporting the idea that TMS has invoiced SJU) for any amounts included in settlements or judgment awards to TMS employees); (*See* Cooper Decl., Ex. 1 at 76:24-77:17.)

(2) he did *not* know whether SJU reimbursed TMS for any portion of the Kalaritis settlement/award; (*See* Cooper Decl., Ex. 1, at 80:4-12.) and

(3) as a TMS employee who was not a principal, he would *not* have been "involved" in whether any invoices were paid or unpaid in any event. (*Id.*)

Accordingly, a complete reading of Rossi's 30(b)(6) testimony on the issue of alleged past practices thwarts TMS' effort to couch a cherry-picked, incomplete portion of same as presenting a disputed issue of material fact.[5]

Former TMS principal Dennis Hasher's 30(b)(6) deposition testimony confirms that SJU did *not* reimburse TMS for any money that TMS paid Kalaritis with respect to his legal claim(s). (*See* Cooper Decl., Ex. 2 at 17:5-19:7, 72:7-19.) And, unlike Rossi, who conceded that he did not "get involved in" whether or not SJU paid certain invoices, Hasher testified that he was responsible for TMS' "billing [of SJU]." (*See* Cooper Decl., Ex. 2 at 17:5-14.) What is more, Hasher testified that he was "not aware of *any* times" that SJU reimbursed TMS for *any*

[5] Significantly, when questioned about other settlements and legal awards, Rossi admitted that he was unaware as to whether or not SJU reimbursed TMS.

settlement or judgment award. (*See* Cooper Decl., Ex. 2 at 72:20-73:24.) (Nor has TMS produced or attached as an exhibit any document reflecting any such payment.)[6]

As such, TMS' one supposed "fact" in support of its opposition to the instant motion is belied not only by Rossi himself, but by Hasher, the TMS principal responsible for billing. Accordingly, TMS' claim must be subject to summary judgment at this stage because TMS presents no genuine issue of material fact for resolution at trial.

CONCLUSION

For the foregoing reasons, SJU respectfully requests TMS' third-party complaint be dismissed with prejudice in its entirety, and that the court grant to SJU any other and further relief it deems appropriate.

Dated: October 6, 2016

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: /s/ Lyle S. Zuckerman

Lyle S. Zuckerman
Scott M. Cooper
1251 Avenue of the Americas – 21st Floor
New York, New York 10019
(212) 489-8230
lylezuckerman@dwt.com
scottcooper@dwt.com

[6] Even assuming, *arguendo*, that TMS could establish that SJU had engaged in the past practice of reimbursing TMS for the settlements and judgment awards that TMS paid to TMS' employees—a proposition with which SJU strongly disagrees—such instances would not negate SJU's right to rely on the indemnification provision *in this case.*